Supreme Court, U. S.
FILED
MAR 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1098

MARATHON OIL COMPANY,

Petitioner,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF OF NATIONAL PETROLEUM REFINERS ASSOCIATION, AMOCO OIL COMPANY, ASHLAND OIL, INC., CITIES SERVICE COMPANY, CONTINENTAL OIL COMPANY, EXXON CORPORATION, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, KERR-McGEE CORPORATION, MAPCO, INC., MOBIL OIL CORPORATION, PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, TEXACO, INC., AND UNION OIL COMPANY AS AMICI CURIAE IN SUPPORT OF THE PETITION

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Dated: March 17, 1977

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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National Petroleum Refiners Association, Amoco Oil Company, Ashland Oil, Inc., Cities Service Company, Continental Oil Company, Exxon Corporation, Getty Refining and Marketing Company, Gulf Oil Corporation, Kerr-McGee Corporation, MAPCO, Inc., Mobil Oil

Corporation, Phillips Petroleum Company, Shell Oil Company, Texaco, Inc., and Union Oil Company file this brief as *amici curiae* to urge that the Court grant the petition for a writ of certiorari to review the decision of the Temporary Emergency Court of Appeals entered in this case on December 6, 1976. All parties to this action have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

National Petroleum Refiners Association is an association whose membership is comprised of virtually all domestic refiners. The remaining *amici curiae* are suppliers of petroleum products and therefore are subject to the Petroleum Allocation and Price Regulations administered by respondent Federal Energy Administration (hereinafter referred to as "FEA") pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §§751-760h (Supp. V 1975) (hereinafter referred to as the "Allocation Act").

The restriction upon credit terms imposed by FEA in 10 C.F.R. §210.62(a) (1976) sharply curtails the ability of all sellers of crude oil and refined petroleum products to adopt rational and economically sensible credit policies in response to current credit market conditions. These sellers are bound by FEA's regulation to follow historical credit policies formulated under conditions prevailing four years ago. The regulation in question is not the exercise of a "limited power necessarily implied for the exercise of the authority expressly granted," as the court below described the agency power in question

(Pet. 13a).[1] On the contrary, FEA stated in the court below that the regulation is intended to cover a "wide variety of practices," such as, "the right to delayed payment, the use of credit cards, the right to a discount for early payment, the right to require a letter of credit or security deposit, the right to charge interest for overdue payments, the right to a free delivery or other special deal including, for example, general loan arrangements such as construction loans for the improvement of service station property." Brief for Appellant in *Marathon Oil Co.* v. FEA, T.E.C.A. No. 6-11, pp. 9-10 (Footnotes omitted).

Amici curiae believe that FEA's broad assertion of implied power to regulate credit terms extends far beyond any authority granted in the Allocation Act. If allowed to stand, FEA would have power to control virtually every aspect of each of hundreds of thousands of credit relationships. It is this assertion by FEA of implied power, and the consequent disruption that has occurred and will increasingly be felt in the market place for petroleum products, that has led *amici curiae* to urge their views before the Court.

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[1] The following abbreviations are used in the citations herein:

"Pet. ___" refers to the Petition for Writ of Certiorari filed by Marathon Oil Company in this case on February 8, 1977.

"R. ___" refers to the Stipulated Record on Appeal filed by the parties to this case in the court below.

STATEMENT

1. The Regulation at Issue.

The critical provision in the regulation challenged by petitioner Marathon Oil Company is the following:

> . . . no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchasers during the base period (for seasonal credit) or on May 15, 1973 (for other credit).[2]

[2] 10 C.F.R. §210.62(a) (1976). The "base period" referred to in the quoted provision is defined by FEA in a different manner for different petroleum products. The "base period" for motor gasoline, for example, is defined as "the month of 1972 corresponding to the current month." 10 C.F.R. §211.102 (1976).

This provision was issued on June 17, 1974 as part of a policy announcement regarding " 'Summer Fill' and other 'Dating Programs'." 39 Fed. Reg. 22121 (June 20, 1974). "Summer Fill" programs are programs that were offered by a number of heating oil suppliers in 1972 under which customers could obtain credit and price advantages by purchasing home heating oil during the summer months and storing it for resale the following winter. Some terms offered in these programs were credit terms (e.g. the right to delay payment for product delivered in May) and some were not (e.g., agreements by suppliers to hold the price of heating fuels constant for customers who elect to purchase in accordance with the program).

Amici curiae believe that the question whether FEA had authority to adopt its policy regarding credit terms offered in "Summer Fill" programs, although fairly comprised within the question presented for review, is somewhat different from the question whether the Allocation Act can be construed to grant FEA plenary power to regulate credit extended in connection with sales of allocated products in the manner set forth in the agency's present regulation. This brief specifically discusses only the latter question.

A predecessor credit regulation, issued on January 14, 1974, less than two months after the enactment of the Allocation Act, provided in pertinent part:[3]

> . . . no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (*e.g.* COD purchasers) during the base period . . .

Both versions were adopted as part of comprehensive regulations issued pursuant to Section 4(a) of the Act, which directs that a regulation be promulgated to provide for mandatory allocation of petroleum products "in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or in a manner prescribed by) such regulation" (15 U.S.C. §753(a) (Supp. V 1975)). The Allocation Act expressly grants no other regulatory powers.

In adopting the initial credit provision, the Federal Energy Office (FEA's predecessor agency) invoked not only the powers granted in the Allocation Act itself, but also powers that Congress previously had granted in the Economic Stabilization Act of 1970, as amended, formerly 12 U.S.C. §1904 note (Supp. V 1975). That Act did contain an express grant of the power to stabilize "interest rates" as well as "prices, rents, wages, and salaries" (*ibid*). Its purpose, unlike the Allocation Act, was to grant the President broad authority to "counter severe inflation that threatened the national economy" (*Fry* v. *United States*, 421 U.S. 542, 548 (1975). All powers granted in the Stabilization Act, however, expired on April 30, 1974, three and a half

[3] 39 Fed. Reg. 1931 (January 15, 1974).

months after the regulations under the Allocation Act were first adopted.

In no regulation prior to the comprehensive allocation program published by the Federal Energy Office on January 15, 1974, had the President or any of his delegates found it necessary to freeze credit terms in the manner set forth in 10 C.F.R. §210.62(a). In fact, the Cost of Living Council (hereinafter "CLC"), the agency to which all Stabilization Act powers were delegated, had expressly disclaimed the need to control credit terms in connection with its price controls.[4] Moreover, even the Mandatory Petroleum Allocation Regulations first issued after enactment of the Allocation Act prohibited only the imposition of "*discriminatively* more stringent credit terms . . . *than the normal business practice of the supplier*," and did not purport to control credit terms by reference to previously followed practices.[5]

Although comprehensive in its scope, the present credit regulation nevertheless is not certain in its meaning, and despite the fact that criminal sanctions can be invoked for willful violations,[6] the regulation provides no guidance in many situations as to the credit terms it permits. The record contains the affidavit of Marathon's

[4]CLC Ruling 1972-73, 37 Fed. Reg. 13278 (July 6, 1972); CLC Phase IV Price Ruling, 73-16, 38 Fed. Reg. 33489 (December 5, 1973); Special Freeze Group "Questions and Answers" No. 8, 38 Fed. Reg. 17490 (July 2, 1973).

[5]39 Fed. Reg. 749 (January 2, 1974) (emphasis added). No explanation has ever been given by the agency for the changes made in its credit regulations between January 2 and January 15, 1974.

[6]Section 5(a)(3)(B) of the Allocation Act, as amended, 15 U.S.C. §754 (a)(3)(B) (Supp. V 1975)).

credit manager, Mr. G. E. Johnston, for example, which sets forth the various types of credit terms employed by Marathon (R. 143-45). As Mr. Johnston's affidavit states, the credit terms "actually made available to particular customers within a given class of trade for a particular product will vary depending upon a number of factors" including Marathon's evaluation of the "ability and willingness of the customer to pay" and the "needs of its customers" (R. 147). Because of the myriad of variables that bear upon credit decisions but have no relationship to pricing, it is not unusual that a given "class of purchasers," which sellers are required to establish on the basis of "price distinctions,"[7] includes purchasers that have been extended comparable prices, but widely varying "credit terms."[8] In many situations, there thus are no definitive credit terms marking the limits of stringency which the regulation purports to impose.

The rulings and decisions which FEA has issued with respect to changes in credit terms have not served to clarify the meaning of its regulation. In these instances, FEA often seems to apply the regulation in a manner which looks only to credit terms offered to a particular purchaser and not, as the provisions in its regulation require, to the terms in effect at these times for the

[7]10 C.F.R. §212.31 (1976).

[8]For example, a given "class of purchasers", all of whom have paid "a comparable price for comparable property or service" (see 10 C.F.R. §212.31 (1976)), commonly includes both cash and credit accounts. See Johnston Affidavit, R. 153.

class to which the purchasers may belong.[9] Accordingly, sellers of petroleum products presently find themselves under a regulation that FEA may interpret as requiring agency approval for any change in any credit term that is questioned by the purchaser affected.

2. Proceedings below.

Marathon commenced this action in August 1974. Its complaint sought relief from the "provisions of the regulations of defendant FEA pertaining to rents and credit terms" (R. 301). In November 1975, while this action was pending in the district court, the Temporary Emergency Court of Appeals decided *Shell Oil Company* v. *FEA*, 527 F.2d 1243 (1975), holding that FEA's regulations pertaining to rent exceeded FEA's authority and thus were invalid. Shortly thereafter Marathon, relying upon the *Shell* decision, moved for summary judgment with respect to both FEA's rent and credit regulations.

While conceding the invalidity of its rent regulation, FEA maintained that the validity of its credit regulation was not "dealt with in the *Shell* case" (R. 161). FEA

[9] *Compare* FEA Ruling 1974-10, 39 Fed. Reg. 15140 (May 1, 1974), CCH Energy Management ¶16,020 *with* FEA Ruling 1975-13, 40 Fed. Reg. 40831 (September 4, 1975), CCH Energy Management ¶16,053; *See also, Coastal States Marketing, Inc.*, 1974 CCH Energy Management Transfer Binder ¶20,664 (September 24, 1974); *Texas City Refining, Inc.*, 1974 CCH Energy Management Transfer Binder ¶20,737 (December 11, 1974); *Crystal Oil Co.*, 1974 CCH Energy Management Transfer Binder ¶20,161 (October 8, 1974); *Bill's Service*, 1976 CCH Energy Management Transfer Binder ¶80,548 (January 15, 1976).

therefore filed a cross-motion for summary judgment upholding its credit regulation and in support thereof relied upon the affidavit of Mr. Ottie T. Vipperman, Jr., then Director of Price and Allocation Policy for FEA (R. 193-258).

The district court held for Marathon and ruled that "10 C.F.R. §210.62(a) is invalid as beyond the scope of the authority granted by [the Allocation Act] to the extent that it regulates the credit terms which a supplier of petroleum products may apply to a purchaser of said products" (R. 3).

The Temporary Emergency Court of Appeals on appeal by FEA reversed "the summary judgment granted by the district court" (Pet. 16a). The court did not, however, instruct the district court to enter judgment in favor of respondents, but remanded the case for further proceedings not inconsistent with its opinion.[10]

REASONS FOR GRANTING THE WRIT

The judgment of the district court in this case reflects established and proper standards for judicial

[10] One reason for the remand, stated in the appellate court's opinion (see Pet. 16a-17a), was to permit the district court to consider in the first instance Marathon's contentions that FEA's credit regulations did not comply with Sections 4(b)(2)(A) and 4(b)(2)(C) of the Allocation Act, 15 U.S.C. §§753(b)(2)(A) and 753(b)(2)(C) (Supp. V 1975). The appellate court's mandate, however, also leaves the district court to proceed with an evidentiary trial of the issues of fact raised by Marathon's contention that the present FEA credit regulation exceeds the limited power which the appellate court found "necessarily implied for the exercise of the authority expressly granted [to FEA]" (Pet. 13a).

review of agency action and accurately perceives the intent of Congress as expressed in the Allocation Act. The district court thus correctly invalidated FEA's credit regulation as an attempt by FEA to go beyond its statutory authority and exercise regulatory control over an economic mechanism which Congress did not see fit to entrust to the agency. The Temporary Emergency Court of Appeals reversed this judgment. Its holding, however, is based upon an uncritical reliance upon conclusions stated in a litigation affidavit submitted by the agency and upon a complete misreading of the relevant legislative history. The appellate court also rested its judgment upon a "rule of deference" to agency action (Pet. 16a) which has no place in the judicial review of an agency whose powers are so expressly limited as those granted in the Allocation Act. Review of this case is necessary, therefore, not only to reinstate the district court's correct resolution of the important question presented, but also to establish proper standards of judicial review under which a legislative intent to limit a grant of power can be recognized and effectuated by the courts.

The express language of the Allocation Act grants no power over credit terms. In fact, the legislative history demonstrates that the overriding purpose of the statute was to effect the establishment of a system for allocating petroleum products and that the power to control price granted in Section 4(a) was included "on the premise that it does no good to require the allocation of products if sellers are then permitted to demand unfair and unrealistic prices." H.R. Rep. No. 93-628, 93d Cong., 1st Sess. 25 (1973). Even the power to control price, therefore, was intended by Congress only as power necessary but subservient to the allocation program mandated by the Act.

The Act sets forth specific means by which it directs the executive to deal with a specific problem. It would be hard to imagine a clearer expression of legislative intent to limit the powers vested in an administrative agency. Congress itself described the power granted in the Act as "specific temporary authority" (Section 2(b), 15 U.S.C. §751(b) (Supp. V. 1975)) and directed that it be exercised in a carefully circumscribed manner (*see* Sections 4(b) and (c), 15 U.S.C. §753(b) and (c) (Supp. V. 1975)). Included among the limitations imposed are express directions that the authority granted therein be exercised to provide, to the maximum extent practicable, for the following (Section 4(b)(1), 15 U.S.C. §753(b)(1) (Supp. V 1975)):

> (H) economic efficiency; and
>
> (I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Particularly in light of these explicit policy limitations, *amici curiae* urge that the court below erred in holding that the express authority to control the economic mechanism of price can necessarily imply authority over the very different economic mechanism of credit. The price at which a commodity is exchanged can be an important determinant of the economic use for which the commodity is employed and the amount allocated to each use. The credit terms agreed upon by a seller and purchaser, by contrast, are related to prevailing capital costs and to contemporaneous judgments as to the individual customer's creditworthiness and need (see R. 152-153).[11]

[11]This distinction between price and credit underlies the holdings that price discrimination prohibited by the Robinson-Patman Act will not be inferred from mere differences in the terms on which a supplier has extended credit to two purchasers. *See, e.g., Craig* v. *Sun Oil Co.*, 515 F.2d 221, 224 (10th Cir. 1975); *Lang's Bowlerama, Inc.* v. *AMF, Inc.*, 377 F. Supp. 405, 408-09 (D.R.I. 1974); *Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959).

The inference drawn by the court below of a congressional intent to confer power over credit terms was based primarily upon the court's reading of a House committee reference to a "'proposed mandatory allocation program of similar scope to that called for in this [allocation] bill,'" (Pet. 12a, fn. 12). As the court explained, the program "referred to obviously is the EPO's Proposed Mandatory Fuel Allocation Program... (38 Fed. Reg. 21797 (Aug. 13, 1973))" (*ibid.*).

The "EPO's Proposed Mandatory Fuel Allocation Program," however, had no provision similar to the broad regulation of credit terms subsequently adopted by the Federal Energy Office after passage of the Allocation Act. That program contained only the following provision concerning credit terms:[12]

> ...a supplier may not require or impose credit terms or payment schedules on wholesale purchase more stringent than the supplier's normal business practice during the first half of 1972, *other than are common under current market conditions (such as higher interest rates).*

If the House Committee Report, so heavily relied upon by the court below, can be construed as expressing any intention regarding power over credit terms in the allocation bill under consideration, it can only be read to demonstrate that the committee envisaged a very limited power to prevent credit terms in the petroleum industry from rising above whatever "current market conditions" from time to time might exist. This provision is no more than a

[12]38 Fed. Reg. 21802 (August 13, 1973) (emphasis added).

prohibition upon the use of credit terms as a device or scheme to circumvent the price provisions in the allocation program, since the imposition of credit terms that exceed current market conditions might suggest that in lieu of a higher price the purchaser was induced to forego other, more favorable, terms available in the credit market. The credit provision in the proposed program, to which the House Committee referred, is not an attempt generally to control credit terms such as that subsequently adopted by the Federal Energy Office and challenged by Marathon in the instant case.

The district court in this case correctly recognized FEA's credit regulation as an unlawful attempt by FEA generally to regulate credit as well as price in connection with the sale of petroleum products. Since the regulation imposes its strictures upon a seller's credit terms even in cases where the seller's prices are below the lawful ceiling prices, the regulation cannot be rationalized as a rule necessary to prevent circumvention. In fact, were circumvention the sole concern, the credit regulation would be superfluous, since 10 C.F.R. §210.62(c) generally prohibits "[a]ny practice which constitutes a means to obtain a price higher than is permitted by the regulations...."

FEA attempts to support its assumption of plenary power to regulate credit by relying upon the affidavit of its then Director of Price and Allocation Policy, Mr. O. T. Vipperman (R. 193-258). Two assertions in this affidavit bear upon FEA's control of credit terms. These assertions, which the court below cited in its opinion (Pet. 10a-11a), are (1) that FEA's credit regulation only made explicit a control over credit that was implicit in earlier price regulations of CLC under

the Stabilization Act[13] and (2) that there was a "likelihood" that credit terms might be used to circumvent the agency's mandatory price and allocation regulations. The record, however, contradicts Mr. Vipperman's affidavit on both points.

With regard to the assertion that control over credit terms was "implicit" in CLC price regulations, the record contains rulings by that agency which specifically stated that credit charges were exempt from its regulations.[14] On the assumed likelihood that

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[13]CLC's actions under the Stabilization Act are relevant to the question under review only to the extent that the court below interpreted the Allocation Act as providing for the continuation of all authority granted in the Stabilization Act. As the court itself recognized in the *Shell Oil* case, *supra*, however, the Allocation Act cannot properly be so interpreted.

[14]CLC Ruling 1972-73, R. 7-8, Special Freeze Group "Questions and Answers" No. 8, R.9; Phase IV Price Ruling 73-16, R.13, 29.:

CLC Ruling 1972-73 not only refutes Mr. Vipperman's claim that control over credit terms was implicit in the CLC price regulation, it explicitly states that credit terms were not controlled. The ruling posits the following situation:

> Company B is a clothing merchant. Company B currently bills customers on the first day of the following month for clothing purchased during the preceding month. The bills are payable in full within 10 days of receipt. Company B wishes to institute a revolving charge plan under which customers would be required to make monthly payments of 10 percent of the outstanding balance (or $20, whichever is larger) plus a carrying charge of 1-1/2 percent per month of the maximum outstanding monthly balance.

The issue considered by CLC – whether the "proposed charges by . . . Company B [would be] prohibited by the Economic Stabilization Regulations" – is answered in the negative.

petroleum suppliers might use credit terms to circumvent FEA's price regulations, Mr. Vipperman's affidavit is contradicted not only by the inherent limitations on such use of credit terms and, as noted *supra* p. 13, by the presence of other impediments to circumvention in the regulatory scheme, but also by the affidavit of Marathon's credit manager which states that "prices being charged for Marathon products have never been a consideration of the Credit Division in making decisions involving credit terms" (R. 151; see also R. 148).

The district court properly disregarded the *post hoc* rationalizations in the Vipperman affidavit. Such litigation affidavits universally have been rejected as a basis for upholding administrative action. See, *e.g. Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971); *Rodway* v. *Department of Agriculture*, 514 F.2d 809, 816 (D.C. Cir. 1975). Moreover, "a regulation is not rationally related to the regulatory purpose of a statute just because an agency says so and . . . reasonableness is not a purely legal question. Some factual basis must appear. . . ." *Pan American Petroleum Corp.* v. *FPC*, 352 F.2d 241, 244 (10th Cir. 1965); *accord, National Association of Regulatory Utility Comm'rs* v. *FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976). As the District of Columbia Circuit has recognized, even the comprehensive regulatory powers granted the Federal Power Commission did not give that agency " 'carte *blanche* to take whatever action it might consider appropriate in furtherance of the objectives of the [Natural Gas] Act. The Commission cannot gain jurisdiction over an activity simply by characterizing it as part of a 'total transaction' of which another part happens to be

subject to the FPC's control." *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1248 (D.C. Cir. 1973) (footnote omitted).

Amici curiae fully agree with Marathon's position respecting the importance of the question presented (Pet. 6-7). We further urge that the unique statutory framework for judicial review of FEA actions accentuates the need for the Court to exercise its supervisory jurisdiction. The Temporary Emergency Court of Appeals is the only appellate forum for those who challenge such actions. Section 211(b) of Economic Stabilization Act, as incorporated by §5(a)(1) of the Allocation Act, 15 U.S.C. §754(a)(1) (Supp. V 1975). There thus is no other court of appeals available to consider either the nature of the "rule of deference" to which the court below has committed itself (Pet. 16a) or the propriety of following such a rule in construing the Allocation Act, a statute in which Congress has so explicitly limited its grant of authority.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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